

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ELIZABETH GUANZON RETUYA,
etc.,

Plaintiff,

v.

CASE NO. 8:08-CV-935-T-17EAJ

MICHAEL CHERTOFF, et al.,

Defendants.

_____/

ORDER

This cause is before the Court on:

Dkt. 17 Motion to Dismiss
Dkt. 20 Response
Dkt. 24 Reply
Dkt. 28 Response

This case is a Petition for Hearing on Applications for Derivative United States Citizenship and United States Passport/Complaint for Mandamus Relief (Dkt. 1). Plaintiff asserts that Plaintiff's application for derivative United States citizenship was unreasonably denied by the United States Embassy in Manila, Republic of the Philippines, in violation of Plaintiff's rights to due process and equal protection under the Fifth Amendment.

I. Standard of Review

As the Supreme Court held in Bell Atlantic v. Twombly, 127 S.Ct. 1955 (2007), a complaint must be dismissed pursuant to rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted if it does not

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plead "enough facts to state a claim for relief that is plausible on its face." Id. at 1974 (rejecting the traditional 12(b)(6) standard set forth in Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The allegations in plaintiff's complaint are presumed true at this stage and all reasonable factual inferences must be construed in plaintiff's favor. However, the Court need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint. Nor must the Court accept legal conclusions cast in the form of factual allegations. To survive a motion to dismiss, the factual allegations in the complaint "must be enough to raise a right to relief above the speculative level." Bell Atlantic, 127 S.Ct. at 1965.

II. Motion to Dismiss

Defendants argue that Plaintiff cannot be deemed a United States citizen by virtue of the judgment of paternity entered by a Florida state court in 2007, when Plaintiff was 36 years of age, which the parties stipulated took effect on July 31, 1981.

Defendants argue that the 2007 adjudication of paternity was not an act of legitimation under Florida law, and did not occur before Plaintiff turned 21, as required by the plain language of the INA, 8 U.S.C. Sec. 1409(a)(1985). Defendants contend that under Florida law in 1981, the year Plaintiff's father moved to Florida, the sole act that could legitimate a child born out of wedlock for all purposes was the marriage of the parents. Fla. Stat. Sec. 742.091(1981).

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Defendants further argue that mandamus is an extraordinary remedy which should be utilized only in the clearest and most compelling of cases, in which: 1) the plaintiff has a clear right to the relief requested; 2) the defendant has a clear duty to act; and 3) no other adequate remedy is available. Defendants argue that mandamus is unavailable to review the denial of Plaintiff's passport application because passports may only be issued to United States nationals, pursuant to 22 U.S.C. Sec. 212, and because passport issuance is a discretionary function exclusively reserved to the Executive Branch. Haig v. Agee, 453 U.S. 280, 293 (1981).

Defendants further argue that Plaintiff cannot succeed in Plaintiff's equal protection claim under the Fifth Amendment, citing Tuan Anh Nguyen v. INS, 533 U.S. 53, 71 (2001), and Plaintiff has no due process right in a claim to citizenship, citing Rios-Valenzuela v. Dep't of Homeland Security, 506 F.3d 393, 400-01 (5th Cir. 2007).

Defendants further argue that only legitimation confers on a child the status in all respects equal to that of a child born in wedlock. Defendants contend that the adjudication of paternity and acknowledgment of paternity are concepts distinct from, and narrower than, the concept of legitimation. An adjudication of paternity provides the basis for a court to order child support, and an acknowledgment of paternity affords the individual certain rights for purposes of intestate succession. Defendants argue that Defendants have not rejected the stipulated judgment. Defendants further argue that Defendants have not determined that Plaintiff established a biological relationship with her father. Defendants stated that Defendants would not reach the biological

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issue until the legitimation issue was first resolved.

III. Plaintiff's Response

In response, Plaintiff contends that Plaintiff has fulfilled every requirement for derivative United States citizenship, but Defendants continue to deny Plaintiff's United States citizenship on the basis of rejecting the lawful judgment of the Florida state court that determined that the State of Florida did in fact legitimate Plaintiff on July 31, 1981. Plaintiff contends that the judgment of the Florida court was not an act of legitimation, but a determination and recognition that the State of Florida had in fact legitimated Plaintiff on July 31, 1981. Plaintiff argues that the United States Code does not set forth any procedural requirements for legitimation by a state, and does not require each state to enact a statutory process for legitimation. Plaintiff argues that the United States Code requires that a state in which the father was a resident legitimate the child before the age of 21, without specifying the manner or procedure.

Plaintiff further responds that Plaintiff is entitled to mandamus relief, as Plaintiff has fulfilled every requirement for derivative United States citizenship, and Defendants have a duty to act but have failed to do so by denying Plaintiff derivative United States citizenship, and no other adequate remedy is available.

IV. Discussion

In ruling on Defendant's Motion to Dismiss, the Court takes the factual allegations of Plaintiff's Complaint to be true.

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Plaintiff was born on February 14, 1969 to Herminia Neri Guanzon aka Erlinda Miranda in the Republic of the Philippines.

Plaintiff's mother was unmarried at the time of Plaintiff's birth. Plaintiff's mother later married a United States citizen, Erwin Ricardo Pena, and moved to the United States. Plaintiff's mother is now deceased.

Plaintiff's father, Charles Joseph Drummond, provided financial support to Plaintiff from her birth until Plaintiff left her home at the approximate age of 18. After his return to the United States, Plaintiff's father married a United States citizen.

In 2006, Plaintiff asked Charles Drummond to bring her to the United States. Thereafter, Plaintiff filed an application for derivative United States citizenship with the American Embassy's American Citizen Services of the Consular and Visa Services section. In August 2006, an adjudicating officer of the Embassy interviewed Plaintiff, and prepared a finding that Plaintiff Retuya submitted all documents and information needed to complete the processing of her citizenship application, except that Plaintiff Retuya was required to provide proof of her father's legal residence/domicile in the U.S. aside from West Virginia, Ohio and Florida after Plaintiff's birth and prior to Plaintiff's 21st birthday.

Charles Joseph Drummond was a legal resident of the State of West Virginia from February 14, 1969 (Plaintiff's birth date) until July 30, 1981. Mr. Drummond was a legal resident of the State of Florida from July 31, 1981 until February 14, 1990 (Plaintiff's 21st birthday).

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Plaintiff Retuya obtained a Final Judgment of Paternity, pursuant to Chapter 742.011, Florida Statutes, on January 31, 2007 in the Hillsborough County Circuit Court, which states that Charles Joseph Drummond is the natural, legitimate and biological father of the petitioner Elizabeth Guanzon Retuya, and that Petitioner is entitled to all filial rights as the child of Respondent. The Final Judgment (Dkt. 1, Exh. C) further states that petitioner is beyond the age of majority, and therefore the Court finds there are no outstanding issues with respect to custody, visitation and/or child support.

In February, 2006, Plaintiff provided a certified copy of the Final Judgment to the Embassy. The Vice Consul sent a denial letter to Plaintiff, which stated that Plaintiff was not legitimated while she was below twenty-one years old.

Plaintiff then entered into a Stipulation with Charles Drummond which states that for purposes of legitimation of Plaintiff Retuya, the Final Judgment is retroactive to July 31, 1981. The Hillsborough County Circuit Court entered an Order ratifying the Stipulation Modifying Final judgment. When Plaintiff provided this Order to the Embassy, the Vice Consul denied Plaintiff's claim to derivative United States Citizenship because Plaintiff was not legitimated under the United States or Philippine law while Plaintiff was below 21 years old.

Plaintiff subsequently filed this case, for unreasonable denial (Count I), and violation of right to due process and equal protection (Count II).

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The Court notes that Defendants do not object to Plaintiff's action being heard by the Court as a declaratory judgment proceeding brought under 8 U.S.C. Sec. 1503(a).

A. Count I - Unreasonable Denial

1. Legitimation

It is undisputed that Petitioner's mother and father never married. Under Sec. 742.091, Florida Statutes (1981), that act would have legitimated Petitioner Retuya in all respects.

It is further undisputed that the stipulated adjudication of paternity did not occur when Plaintiff Retuya was under the age of 21. The Order Ratifying Stipulation Modifying Final Judgment is dated December 5, 2007. The Final Judgment is dated January 31, 2007.

The Court notes that, as to a child born out of wedlock outside the United States to a father who is a United States citizen, 8 U.S.C. Sec. 1409(a) requires that paternity be established while a child is under the age of twenty-one years by legitimation. 8 U.S.C. Sec. 1409(a) (amended by Immigration and Nationality Act Amendments of 1986, Pub.L. No. 99-653, 100 Stat. 3655 (1986)). Plaintiff's "legitimation" under Florida law did not take place before Plaintiff's 21st birthday.

2. Application of Res Judicata or Collateral Estoppel

Res judicata bars a subsequent claim when a final judgment has been entered on the merits of the same cause of action in a prior lawsuit between the parties. Res judicata requires: 1)

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that a court of competent jurisdiction render a final judgment on the merits of the first action; and 2) that the parties and causes of action in both suits be identical. Richardson v. Ala. Bd. Of Educ., 935 F.2d 1240, 1244 (11th Cir. 1991). In this case, the parties and the causes of action in both suits are not identical.

Collateral estoppel requires: 1) the issue at stake is identical to the one alleged in the prior litigation; 2) the issue was actually litigated in the prior litigation; 3) the determination of the issue was a critical and necessary part of the judgment in the prior case; and 4) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding. Hart v. Yamaha-Parts Distribs., Inc., 787 F.2d 1468 (11th Cir. 1986). The issue in the prior case and this case are not identical.

After consideration, the Court finds that res judicata and collateral estoppel do not apply.

3. Biological Relationship

The record in this case establishes that the Department of State did not make any determination as to the biological relationship between Petitioner and her father. (Dkt. 1, Exh. B, Exh. D.) That issue was deferred until resolution of the legitimation issue, which was resolved adversely to Plaintiff. Therefore, the issue of biological relationship was never reached.

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After consideration, the Court grants Defendants' Motion to Dismiss as to the above issues.

II. Equal Protection and Due Process

The Supreme Court has determined that 8 U.S.C. Sec. 1409 does not violate equal protection. Tuan Anh Nguyen v. Immigration and Naturalization Service, 533 U.S. 53 (2001).

A person not born in the United States can acquire citizenship only as provided by Acts of Congress. Miller v. Albright, 523 U.S. 420, 424 (1998). The facts of this case alleged in the Complaint do not establish a vested constitutional right of which Plaintiff has been deprived.

After consideration, the Court **grants** the Motion to Dismiss as to this issue.

III. Mandamus

Mandamus is an extraordinary remedy which should be utilized only in the clearest and most compelling of cases. Cash v. Barnhart, 327 F.3d 1252, 1257 (11th Cir. 2003). Mandamus is "only appropriate when: 1) the plaintiff has a clear right to the relief requested; 2) the defendant has a clear duty to act; and 3) no other adequate remedy is available."

Plaintiff has not established a clear right to the relief requested. The Court also notes that passport issuance is a discretionary function exclusively reserved to the Executive Branch. Haig v. Agee, 453 U.S. 280, 293 (1981). Accordingly, the

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Court **denies** the relief requested in Plaintiff's Petition.
Accordingly it is

ORDERED that Defendants' Motion to Dismiss is **granted**, with
prejudice, and the Clerk of Court shall close this case.

DONE and ORDERED in Chambers, in Tampa, Florida on this
28th day of September, 2009.



ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record